Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

MARWAN AFANEH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHERE A JUDICIAL DETERMINATION IS MADE THAT AN INDIVIDUAL WAS UNLAWFULLY ARRESTED WITHOUT PROBABLE CAUSE, CAN STATEMENTS OBTAINED AS A DIRECT RESULT OF THE UNLAWFUL ARREST STILL BE INTRODUCED IN EVIDENCE BY THE PROSECUTION, UNDER THIS COURT'S DECISION IN MICHIGAN V. SUMMERS, 452 U.S. 692 (1981)?

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MARWAN AFANEH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

To The Honorable Chief Justice and Associated Justices of The Supreme Court Of The United States

Petitioner, **MARWAN AFANEH**, respectfully prays that a writ of certiorari issue to review the July 12, 1994 judgment of the United States Court of Appeals for the Sixth Circuit, which judgment became final with the Order issued by the Court on August 18, 1994, denying a petition for rehearing en banc.

OPINIONS BELOW

The August 3, 1993 judgment of the United States District Court for the Northern District of Ohio, Eastern Division, suppressing statements allegedly made by Petitioner immediately after an unlawful arrest, is unpublished and contained in the Appendix hereto, beginning at page A-12. The July 12, 1994 majority decision, entered over dissent, by the United States Court of Appeals for the Sixth Circuit, which also found the arrest of Petitioner to be unlawful and without probable cause, but reversed the District Court's suppression of statements obtained from the unlawful arrest under this Court's decision in Michigan v. Summers, 452 U.S. 692 (1981), is unpublished and contained in the Appendix hereto, beginning at page A-1.

JURISDICTIONAL STATEMENT

The case arises out of a federal prosecution for the alleged possession of firearms by a felon, in violation of 18 U.S.C. §922(g)(1). Jurisdiction was vested in the United States District Court for the Northern District of Ohio, Eastern Division, pursuant to 18 U.S.C. §3231. Respondent appealed the District Court's August 3, 1993 Order suppressing statements obtained from an unlawful arrest to the United States Court of Appeals for the Sixth Circuit, pursuant to 18 U.S.C. §3731. The jurisdiction of the United States Supreme Court is sought, pursuant to 28 U.S.C. §1254(1), to review the July 12, 1994 decision entered by the Sixth Circuit, over dissent (A-1), which reversed the District Court's August 3, 1993 Order (A-12); and, allowed for the admission of statements directly obtained from an unlawful arrest, under this Court's holding in Michigan v. Summers, supra.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, FOURTH AMENDMENT

The right of the people to be secure in their persons against unreasonable searches and seizures shall not be violated, and no

warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On June 3, 1993, Petitioner, **MARWAN AFANEH**, was named as a defendant in a two (2) count indictment returned by the federal grand jury for the Northern District of Ohio, in a case styled United States of America v. Afaneh, Case No. 1:93CR175. The two (2) count indictment alleged that on or about February 8, 1993, Petitioner, a felon, knowingly possessed two (2) .38 caliber firearms, in violation of 18 U.S.C. §922(g)(1).

On June 23, 1993, Petitioner filed a Motion to Suppress Evidence Obtained or Derivatively Obtained From the February 8, 1993 Unlawful Arrest of Petitioner; and, on July 23, 1993, the District Court conducted a full evidentiary hearing in the matter.

On August 3, 1993, the District Court (Dowd, J) entered a Memorandum Opinion and Order which found that the February 8, 1993 warrantless arrest of Petitioner was unlawful and without probable cause; and, that statements allegedly made by Petitioner immediately following his unlawful arrest were obtained by police in violation of Petitioner's Fourth Amendment protections and inadmissible, under the "firmly established" policy of law set forth by the United States Supreme Court in Davis v. Mississippi, 394 U.S. 721 (1969); Brown v. Illinois, 422 U.S. 590 (1975); Dunaway v. New York, 442 U.S. 200 (1979); Taylor v. Alabama, 457 U.S. 687 (1982); and, Hayes v. Florida, 470 U.S. 811 (1985) (A-12, 16). On August 20, 1993, Respondent filed its Notice of Appeal contesting the Memorandum and Order entered by the District Court.

On July 12, 1994, the Sixth Circuit Court of Appeals entered a majority decision, over dissent, reversing the District Court's Order which suppressed statements allegedly made by Petitioner immediately following his unlawful arrest. The majority decision, as well as the dissent, specifically found that the Petitioner had, in fact, been unlawfully arrested, without an arrest warrant and without probable cause. The majority decision, however, excused the unlawful conduct of the police to permit the admission of statements directly obtained following an unlawful arrest, under this Court's decision in

Michigan v. Summers, supra (A-1, 8-9).

On July 20, 1994, a Petition for Rehearing En Banc was filed in the Sixth Circuit Court of Appeals, which was denied by Order dated August 18, 1994. (See Order contained in Appendix at page A-21).

On August 23, 1994, Petitioner filed a Motion for Stay of Mandate Pending Application to the Supreme Court for a Writ of Certiorari, which was granted by the Sixth Circuit on August 26, 1994. (See Motion for Stay contained in Appendix at page A-22).

STATEMENT OF THE FACTS

On February 5, 1993, Detective James Brady of the Cleveland Police Department (CPD) obtained a search warrant from the Court of Common Pleas for Cuyahoga County, Ohio, to search 25 stores in Cleveland, Ohio for evidence of foodstamp trafficking. All of the 25 stores targeted were owned or operated by Arab-Americans.

Dave's Drive-Thru Mini Mart (hereinafter "Dave's Mini Mart") was one (1) of the 25 stores targeted to be searched. Petitioner has a prior felony record and, after his release from prison in 1990, was the manager of Dave's Mini Mart which was owned by his sisters, Intesar Afaneh and Fadwa Sadeq, and had ten (10) full-time employees. The store was open 24 hours a day, and located in a high crime area in Cleveland's inner-city in which 11 Arab-American grocery store owners or operators had been murdered in a two (2) year period.

The search warrant affidavit of Detective Brady alleged that a cashier at Dave's Mini Mart, on February 2, 1993, sold a 40-ounce bottle of beer to an "undercover" officer for $1.90 in foodstamps; and, also exchanged $36.00 in cash for a $50.00 book of foodstamps in another transaction for an alcoholic beverage.

No information was contained in the extensive 17 page search warrant affidavit regarding Petitioner; and, no information from the extensive investigation conducted by Detective Brady caused him to include Petitioner's name as being in any way involved in the alleged foodstamp trafficking activity which was the subject matter of the search.

1. Police Directive to Arrest, Without an Arrest Warant, Everyone Employed at the 25 Stores to be Searched.

Prior to the execution of the search warrant, Detective Brady conducted a meeting with all of the law enforcement officers participating in the search and directed them to arrest all employees at the 25 stores to be searched for foodstamp trafficking on the theory that if one (1) employee at a grocery store had engaged in foodstamp trafficking, all of the other employees were also involved and knew about it. The police planned to arrest all store employees, incarcerate them, take their "mug" shots, and then the undercover officers involved in the alleged transactions could identify the individuals most culpable at a later date for charging purposes.

Detective Thomas Alexander (CPD) was specifically chosen to participate in the execution of the search warrant on Dave's Mini Mart due to his prior investigation and arrest of Petitioner, "in the early '80s", which resulted in Petitioner's prior felony convictions. Detective Alexander had also observed Petitioner numerous times in the past and was of the impression that Petitioner was the owner of Dave's Mini Mart because he drove an expensive car, wore nice clothes and owned property in the community.

Although the name of Petitioner was known to Detective Brady and Detective Alexander, and they had the "impression" Petitioner was the owner of Dave's Mini Mart, no attempt was made to obtain an arrest warrant for Petitioner, the known property owner of the store, Intesar Afaneh, or the cashier on duty at the time of the alleged unauthorized foodstamp transactions which purportedly occurred on February 2, 1993.

2. February 8, 1993 Arrest of Petitioner and Other Store Employees; and, Search of Dave's Mini Mart.

On February 8, 1993, at approximately 3:10 p.m., federal and state law enforcement agents entered Dave's Mini Mart for the specific purpose of arresting Petitioner for foodstamp fraud and executing the search warrant. Upon entering the store, Detective Alexander observed Petitioner and informed him that he was under

arrest for foodstamp fraud; and, that law enforcement agents had a search warrant concerning "foodstamps and contraband". Petitioner was immediately handcuffed, read his rights, searched and placed under police custody. Two (2) other employees present were also placed under arrest for foodstamp fraud, handcuffed, searched and placed under police custody -- Mohammed Nasar and Jerome Coleman.

Immediately after Petitioner was arrested, Special Agent Cavan (FBI) questioned Petitioner if there were any weapons inside the store. In response, Petitioner informed Special Agent Cavan there was a weapon under the cash register; and, a .38 caliber Rohm revolver was seized in a brown paper bag.

Special Agent Cavan continued to question Petitioner as to whether there were any other weapons in the store. In response to this inquiry, Petitioner informed Special Agent Cavan that there was a revolver in the office; and, Petitioner was taken by Special Agent Cavan and Detective Alexander, while still handcuffed, to an office area that was also used for storage. Petitioner informed the officers that a weapon was located to the right of the desk in the office, next to the safe in a heat duct. The weapon, a .38 caliber six (6) shot revolver in a brown paper bag was located and seized.

While Petitioner was still handcuffed and in police custody, Special Agent Cavan continued to question Petitioner as to his knowledge regarding the seized weapons. The officers present knew Petitioner had a prior felony record. In response to these inquiries, Petitioner informed Special Agent Cavan that the weapons did not belong to him; that he [Petitioner] was only the manager of the store which was owned by his sisters; and, that "possibly" the prior owner had left them when the ownership changed and "they" might have given the previous owners some money for "the guns".

After questioning Petitioner regarding his knowledge of firearms at the premises, law enforcement officers commenced their search for evidence of foodstamp trafficking -- the subject matter of the search warrant. No foodstamps were found or seized during the search which were identified as matching the purported foodstamps exchanged in the alleged unauthorized foodstamp transaction reportedly undertaken by "undercover" agents at Dave's Mini Mart on February 2, 1993. Law enforcement agents found no evidence of criminal wrongdoing during the course of the search as Dave's Mini Mart was an authorized store for the exchange of foodstamps.

Immediately following the search, Petitioner and the other store employees arrested were still taken in a police van and jailed where photographs were taken and they were each fingerprinted. Petitioner and the other store employees were incarcerated overnight while a determination was made as to whether or not they would be "charged" or released. In fact, 64 persons were arrested and jailed during the "dragnet" arrest and search of the 25 stores conducted on February 8, 1993, most of whom were Arab-Americans, without being charged with the commission of a crime.

Petitioner and the two (2) other store employees arrested with him were released the following afternoon and were never charged with any alleged criminal violations in this matter regarding the purported "foodstamp fraud", nor were the store owners of Dave's Mini Mart, or the store itself. Of the 25 stores searched on February 8, 1993, Dave's Mini Mart was the only store not charged with any criminal wrongdoing regarding the allegations of foodstamp fraud.

The property seized during the February 8, 1993 raid of Dave's Mini Mart was subsequently returned to the store owners, Intesar Afaneh and Fadwa Sadeq, with the exception of the two (2) .38 caliber revolvers, after a waiver was signed releasing the Cleveland Police Department of any liability in this matter.

No fingerprints attributable to Petitioner were found on the two (2) seized .38 caliber revolvers; and, a trace of the two (2) handguns by the Department of Alcohol, Tobacco & Firearms (ATF) did not connect Petitioner in any way with ownership or possession of the handguns. No charges were brought by the Cleveland Police Department against Petitioner in relation with the two (2) seized revolvers.

3. Return of Indictment and Suppression of Statements Attributed to Petitioner as Fruit of an Unlawful Arrest Without Probable Cause.

Four (4) months after the February 8, 1993 search of Dave's Mini Mart and the arrest and subsequent release of Petitioner, the indictment was returned in the herein matter. Petitioner was charged with being a felon knowingly in possession of a firearm, i.e. the two (2) .38 caliber revolvers seized on February 8, 1993 at

Dave's Mini Mart.

Following a hearing on July 23, 1993, on the merits of Petitioner's Motion to Suppress Evidence Obtained, or Derivatively Obtained, From the Unlawful Arrest of Petitioner, the District Court (Dowd, J) found that the warrantless arrest of Petitioner for foodstamp trafficking violations on February 8, 1993 was without probable cause and unlawful; that Petitioner's conduct and the statement attributed to Petitioner immediately following his unlawful arrest were the fruit of an unlawful seizure of Petitioner, in violation of his Fourth Amendment rights and protections; and, were therefore suppressed, and the government was foreclosed from introducing "any testimony as to how or by what means the weapons were recovered to the extent that testimony would make any reference, direct or indirect, to the statements or conduct of the defendant [Petitioner]" (A-12).

4. Sixth Circuit Decision Finding the Arrest of Petitioner to be Unlawful But Allowing for the Admission of Statements Obtained From an Unlawful Arrest.

Respondent appealed the decision entered by the District Court to the United States Court of Appeals for the Sixth Circuit. The majority decision (2-1) of the Sixth Circuit found that police had, in fact, unlawfully arrested Petitioner, without probable cause, but excused the unlawful conduct of the police, under the Supreme Court's decision in Michigan v. Summers, supra, as construed by the Sixth Circuit in United States v. Fountain, 2 F.3d 656 (6th Cir. 1993) (A-1).

The dissenting opinion found that the facts addressed in Summers and Fountain did not concern an unlawful arrest, but an entirely different issue; and, that the District Court had properly suppressed statements directly obtained by the police from the Petitioner immediately following an unlawful arrest without probable cause (A-10 and 11).

REASONS FOR GRANTING WRIT

I. CERTIORARI SHOULD BE GRANTED SO THIS COURT CAN DECIDE THE IMPORTANT FEDERAL QUESTION OF WHETHER THE PROSECUTION CAN UTILIZE EVIDENCE, IN THE FORM OF STATEMENTS, OBTAINED AS A DIRECT RESULT OF AN UNLAWFUL ARREST, WHERE THE UNLAWFUL ARREST AND QUESTIONING OF A SUSPECT OCCURS PRIOR TO THE EXECUTION OF A SEARCH WARRANT.

The subject matter of this Petition involves a question of exceptional importance effecting fundamental rights of all citizens as well as those of an accused in a criminal proceeding.

The underlying facts of this case are not in dispute and concern a conscious and express decision by law enforcement authorities to arrest Petitioner for a specific crime, foodstamp trafficking, without first attempting to obtain an arrest warrant. During the same police operation, law enforcement authorities also decided to arrest dozens of citizens in a mass, warrantless, dragnet arrest, without probable cause, for the express purpose of incarcerating these people to determine, at a later date, which, if any, would be charged with criminal violations.

The District Court, the majority decision and dissenting Opinion of the Sixth Circuit Court of Appeals, all unanimously found the conduct of the police to be unlawful in arresting Petitioner without an arrest warrant and without probable cause.

The majority decision of the Sixth Circuit found, however, over dissent, that although the arrest of Petitioner was unlawful and without probable cause, the police could have detained Petitioner prior to the execution of a search warrant at his place of employment, under the Supreme Court's decision in Michigan v. Summers, supra; that the unlawful arrest and interrogation of Petitioner occurred after he was given Miranda warnings and prior to the execution of the search warrant; and, that statements allegedly made by Petitioner immediately following his unlawful arrest and prior to the execution of the search warrant were, therefore, admissible against Petitioner at time of trial.

As noted in the dissenting Opinion, the majority decision entered by the Sixth Circuit relied upon a construction of this Court's Decision in Michigan v. Summers, supra, which addressed an entirely different issue not relevant to the facts sub judice. In doing so, the majority decision expanded this Court's rationale in Summers to excuse unlawful police misconduct. This has created a dangerous new legal precedent previously unknown in Anglo-American jurisprudence.

In Michigan v. Summers, supra, police obtained a warrant to search a home for narcotics. As police officers were about to execute the warrant to search the home for narcotics, they encountered the owner of the home and detained him while they searched the premises. After finding narcotics in the basement of his home, the police arrested him, searched his person and found in his coat pocket an envelope containing 8.5 grams of heroin. The homeowner sought to have the heroin obtained from his coat pocket suppressed as evidence from an unlawful arrest without probable cause.

The Court in Summers held that for Fourth Amendment purposes, the warrant to search for narcotics founded on probable cause implicitly carried with it the limited authority to detain the occupant of the premises while a proper search was conducted; and, after narcotics were found in his basement, police had probable cause to arrest and search him. Therefore, the arrest and search incident thereto were constitutionally permissible. Michigan v. Summers, 452 U.S. 692, 705.

Unlike the facts in Summers, the police in the case sub judice made a conscious and express decision to arrest Petitioner for foodstamp fraud prior to going to the place to be searched -- his place of employment. While police knew the identity of Petitioner and believed he had an ownership interest in the store to be searched, no attempt was made to first obtain an arrest warrant, in violation of all departmental policy.

The search warrant affidavit provided no information whatsoever about Petitioner and never alleged that he was in any way involved in foodstamp trafficking.

Unlike the facts in Summers, police arrested, searched and questioned Petitioner prior to the execution of the search warrant. Immediately after the arrest for "foodstamp fraud", but prior to the search, police read Petitioner his Miranda rights and questioned him

while in police custody, a known felon, as to his knowledge of weapons located in the store.

Unlike the facts in Summers, no evidence of foodstamp fraud was found after the search was conducted at Petitioner's place of employment. Petitioner and other store employees were still jailed overnight for "foodstamp fraud", but no charges were ever brought against Petitioner or his employer for any alleged foodstamp violation.

The Sixth Circuit majority decision essentially eviscerates the obligation for police officers to obtain an arrest warrant when they specifically intend to arrest a specifically identified individual for a specific criminal violation. This holding is entirely inconsistent with the Supreme Court's decision in Beck v. Ohio, 379 U.S. 89 (1964).

> "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." Id., at 96.

The decision of the majority, in effect, undermines the rationale for the exclusionary rule and allows the suspension and termination of an individual's Fourth Amendment right to be secure in his person, free from unlawful seizures by the police, at the whim of any police officer executing a warrant. This creates a dangerous legal precedent inconsistent with the Supreme Court's holding in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), and its progeny.

> "Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Be-

> cause it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice." Id., at 660.

While police were entitled to detain Petitioner at his place of employment during the execution of a search warrant, under Summers, the Summers Court never authorized the unlawful arrest of a suspect, without a warrant or probable cause, for the purpose of interrogating the suspect prior to the execution of the search warrant. To the contrary, the type of limited detention authorized by the Court in Summers did not envision the wholesale arrest and interrogation of suspects without a warrant or probable cause, prior to the execution of a search warrant.

> " . . . The detention of one of the residents while the premises were searched, although admittedly a significant restraint of liberty, was surely less intrusive than the search itself . . . . Furthermore, the type of detention imposed here is not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention." (Emphasis added). Michigan v. Summers, supra, 701, 702.

Unlike the facts in Summers, police arrested, searched and questioned Petitioner prior to the execution of the search. When the search of Petitioner's place of employment produced no evidence of

criminal wrongdoing regarding foodstamp trafficking, Petitioner was still jailed and processed for "foodstamp fraud". While Petitioner was not charged for any allegation of foodstamp fraud arising from the search, he was subsequently charged on the basis of statements obtained as a result of his unlawful arrest.

The Sixth Circuit majority decision also found that the giving of Miranda warnings further alleviated the potential constitutional violation to Petitioner. This finding further emasculates the historic protections insured by the exclusionary rule and is entirely inconsistent with this Court's decision in Brown v. Illinois, 422 U.S. 590 (1975).

> "If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted . . . . Arrests made without warrant or without probable cause, for questioning or 'investigation', would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings." Brown v. Illinois, supra at 602.

The Sixth Circuit majority decision has abandoned the noble ideals historically enforced by the exclusionary rule and has construed this Court's decision in Michigan v. Summers, supra, to reward official misconduct.

> "Evidence obtained by police officers in violation of the Fourth Amendment is excluded at trial in the hope that the frequency of future violations will decrease. Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly,

over the long term, this demonstration that our society attaches serious consequences to violations of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them to incorporate Fourth Amendment ideals into their value systems." (Emphasis added). Stone v. Powell, 428 U.S. 465, 492 (1976).

II. THE SIXTH CIRCUIT'S RULING IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL, AS NO OTHER CIRCUIT COURT HAS EVER HELD THAT STATEMENTS OBTAINED AS A DIRECT RESULT OF AN UNLAWFUL ARREST CAN BE INTRODUCED BY THE PROSECUTION AT TIME OF TRIAL.

In reviewing the facts of this case, the District Court, the majority decision and the dissenting opinion entered by the Sixth Circuit Court all unanimously found that Petitioner had been subjected to an unlawful arrest without probable cause.

Under these findings of fact, no other Circuit Court has ever found that statements directly obtained from an unlawful arrest without probable cause can be legally introduced by the prosecution at time of trial.

The Sixth Circuit majority decision in construing this Court's holding in Michigan v. Summers, supra, to allow for the admission of unlawfully obtained evidence is unprecedented and rewards a "manifest neglect if not an open defiance of prohibitions of the Constitution". Weeks v. United States, 232 U.S. 383, 394 (1914).

In Weeks, the Supreme Court adopted the exclusionary rule and noted that while efforts to bring the guilty to punishment are praiseworthy, those efforts:

> ". . . are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in the embodiment in the fundamental law of the land." Id., at 393.

The Sixth Circuit majority decision has rendered a finding -- that police misconduct may be rewarded -- which is repugnant to the fundamental concepts set forth in the Fourth Amendment of the United States Constitution and the exclusionary rule as construed and adopted in decisions of this Court.

Accordingly, Petitioner, **MARWAN AFANEH**, prays this Honorable Court assert its jurisdiction and hear this case on its merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the foregoing Petition for a Writ of Certiorari has been served upon Drew S. Days, III, Solicitor General, Department of Justice, 10th and Pennsylvania Avenues, Room 5143, Washington D.C., 20530, this ____ day of September, 1994.

_____

ANGELO F. LONARDO

APPENDIX

FILED

JULY 12, 1994

LEONARD GREEN, CLERK

No. 93-3900

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

MARWAN AFANEH,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

(NOT RECOMMENDED FOR FULL-TEXT PUBLICATION)

BEFORE: MARTIN, RYAN, and SUHRHEINRICH, Circuit Judges.

RYAN, Circuit Judge. The district court granted defendant's motion to suppress certain statements, but denied his motion to suppress two firearms found pursuant to a search warrant. The government appeals under the authority of 18 U.S.C. § 3731, claiming the district court erred in suppressing the statements made by Afaneh after his arrest. Afaneh cross-appeals, arguing the district court erred in denying his motion to suppress the weapons. We reverse the district court's decision to suppress Afaneh's statements and decline to reach the issue raised by Afaneh.

I.

In early 1993, the Cleveland Police Department conducted a major investigation into food stamp fraud. As part of this

investigation, the police targeted a store known as Dave's Drive Thru Mini Mart. The registered owners of the store are two sisters, Intesar Afaneh and Fadwa Sadeg. The utilities are registered in the

name of a third person, Awni Shuman.

The Cleveland Police sought a search warrant for 25 stores in which undercover officers obtained cash for food stamps, used food stamps to purchase non-qualified items, or both. The evidence regarding Dave's Drive Thru is recounted in paragraph 48 of the supporting affidavit:

> **11625 SUPERIOR, DAVE'S DRIVE THRU MINI-MART & KITCHEN,** a store licensed to accept FEDERAL FOOD STAMP COUPONS, on Tuesday, February 2, 1993, an undercover law enforcement officer ordered on (1) fifth of Wild Irish Rose Wine; placed a fifty dollar book of FEDERAL FOOD STAMPS on a turntable and asked "how much cash can I get for the rest of it". The cashier said "36". The officer said "okay" and the cashier gave the officer $36.00 in U.S. Currency and the bottle of wine. On the same day a second undercover law enforcement officer ordered a 40 oz bottle of Old English 800 beer which totaled $1.90. The cashier brought the beer to the counter and the officer gave the cashier one (1) five dollar FEDERAL FOOD STAMP and received three (3) one dollar FEDERAL FOOD STAMPS and ten cents in coin as change.

Under federal law, alcohol may not be purchased with food stamps, and food stamps may not be exchanged for cash. A state court judge issued a search warrant, which allowed the officers to search for various items used in food stamp fraud, as well as for firearms. According to testimony given at the suppression hearing, the Cleveland police routinely include firearms in their warrants for the protection of the officers and the public.

The Cleveland Police organized a team of five officers to execute the search warrant at each of the 25 stores. Detective Alexander was assigned to head the Dave's Drive Thru search team because he knew Marwan Afaneh. Alexander had arrested Afaneh on arson bombing charges in the early 1980's and was aware that Afaneh had been arrested for food stamp trafficking in the mid

1980's. The police believed that Afaneh was either the manager or the owner of Dave's Drive Thru. Apparently, the registered owners of the store are Afaneh's sisters. Alexander testified at the suppression hearing that he believed Afaneh owned the store because Afaneh drove an expensive car, wore nice clothes and jewelry, and owned two pieces of property.

The officers charged with executing the search warrant were instructed to arrest all employees at each of the stores named in the warrant. The officers had no arrest warrants and did not attempt to obtain any. According to Detective Brady, the officer in charge of the case, obtaining arrest warrants was not practical because the police did not have the names of the employees involved in the actual undercover buys and could not obtain those names without revealing the identify of their undercover officers. Brady acknowledged that the police had basic descriptions of the employees involved, but testified that these descriptions were not included in the search warrant or the affidavit used to get the warrant. Brady testified that the had been told by experts at the Department of Agriculture that if one employee at a store was involved in food stamp trafficking, so were all the other employees. Accordingly, he instructed the officers to arrest all the employees at every store. The plan was that the employees would be held in jail until they were booked, and then their photographs would be shown to the undercover officers who made the buys. The employees identified by the officers would be charged and the others would be released.

In accordance with their instruction, the officers placed Afaneh under arrest for food stamp trafficking as soon as they entered Dave's Drive Thru. They handcuffed him, gave him Miranda warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), and informed him that they have a search warrant. The officers then asked Afaneh whether any weapons were in the store. Afaneh directed the police to a loaded .38 caliber revolver hidden in a paper bag behind some bottles near the cash register. He also told the officers that there was a weapon in his office. That weapon was another loaded .38 caliber revolver and was hidden in a paper bag secreted under a heating duct. Afaneh also told the police that the guns were not his, but rather had belonged to the previous owners of the store. He stated that the current owners might have paid the prior owners for the guns. The officers seized the

weapons, as well as other items, and took Afaneh to the jail. Afaneh was not charge with food stamp fraud, but was charged with two counts of being a felon in possession of a firearm.

II.

Before trial, Afaneh moved to suppress both the statements he made after his arrest and the guns found by the police as a result of those statements. The district court held a hearing and then issued a memorandum opinion and order granting the motion, in part. After recounting the facts, the district court found that Detective Brady had failed to articulate a basis for his belief that everyone working at every store named in the warrant was involved in food stamp trafficking. The court also found that this was the only reason advanced for Afaneh's arrest. The court concluded that neither Brady nor Alexander had probable cause to arrest Afaneh. At the time Afaneh was arrested, the police had no evidence to link him to food stamp trafficking and had not yet found the guns which would provide the basis for the later indictment. The police knew only that two employees at the store had committed food stamp violations. As a result of these findings, the district court suppressed Afaneh's statements that led the police to the weapons.

The court did not, however, find that the guns should also be suppressed. The government argued that the weapons would inevitably have been discovered and seized pursuant to the warrant. The court agreed that the weapon near the cash register would inevitably have been found, but did not agree that the weapon in the heating duct would have also been found. Moveover, with respect to both weapons, the court held:

> When a searching party, responding to a lawfully issued search warrant, is engaged in a meticulous search of a property such as authorized in this case, there is always the possibility of an inadvertent discovery of a firearm under circumstances that might be hazardous to the searching party. Consequently, with or without a mandate to seize weapons contained in the search warrant, the court is of the view that it is not unreasonable to inquire about the possibility of

> firearms on the premises, taking into account the safety of all persons on the premises, be they a part of the searching party or mere bystanders. Consequently, the court will not impose the sanction of suppression as it relates to the recover of the two weapons.

III.

The government argues that the district court erred in suppressing Afaneh's statements for either of two reasons: (1) the officers lawfully arrested Afaneh, or (2) the officers lawfully detained and questioned Afaneh while executing their search warrant.

A. Afaneh's Arrest

The government contends that the officers had probable cause to arrest Afaneh at the time they walked into the store. According to the government, the search warrant provided probable cause to believe that someone on the premises was committing a crime. Consequently, only minimal additional indicia of individualized suspicion was required to arrest Afaneh. To show this additional requirement, the government points to circumstantial evidence, such as Afaneh's clothes and property, that suggest Afaneh was the manager or owner of the store. Detective Brady also stated that he had been told Afaneh was the manager. The government then turns to very general information linking Afaneh to food stamp trafficking:

> Because the licensed stores[1] also had to act as conduits or transfer houses for illegal trafficking, they were the major targets of the investigation. The managers or owners of the licensed stores were the most culpable or involved persons, since they were the ones who ultimately had to bank or redeem the illegally obtained food stamp. Moreover, Brady learned from his investigation that all the employees at the store where trafficking occurred were involved in that trafficking.

[1]Dave's Drive Thru was a licensed store

The government also pointed to general information that owners of these stores often placed the stores in another person's name to conceal their identities or past records; Dave's Drive Thru was apparently registered in the name of two of Afaneh's sisters.

Whether the relevant facts amount to an illegal arrest is a question of law, which this court reviews de novo. The standard for determining the validity of an arrest is well established:

> Whether that arrest was constitutionally valid depends . . . upon whether, at the moment the arrest was made, the officers had probable cause to make it -- whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense.

Beck v. Ohio, 379 U.S. 89, 91 (1964).

The question, then, in modern media parlance, is what did the officers know about criminal activity on the premises and when did they know it. First, they knew, at the instant they walked through the doors of Dave's Drive Thru, that employees at the store had sold undercover officers alcohol in exchange for food stamps. These transactions violated federal law. Second, they knew that the registered owners of the store were apparently two of Afaneh's sisters, and that the utilities were registered in the name of a third individual. Third. the police knew that Afaneh was somehow connected with the store. They believed he was either the owner or the manager, likely the owner due to the expensive clothes, jewelry, and car he possessed. Fourth, some unidentified person at the Department of Agriculture told the detective in charge that if one employee at the store was involved in food stamp trafficking, all employees were involved. The record does not contain any justification for this assertion. Finally, they knew that managers and owners of licenses food stamp dealers were often conduits for illegal trafficking.

The police had been reliably informed that someone at the store was involved in food stamp violations, but they had no

solid information to connect Afaneh to the violations. All they had were vague beliefs and suspicions. Without more, without something specifically relating Afaneh to the food stamp violations, the police did not have probable cause to arrest him. The government's case for probable cause hinges on two general assertions: 1) all employees at the store were involved in food stamp trafficking, and 2) managers and owners of licensed stores were particularly likely to be involved in trafficking. The government, however, provides no reliable basis for these assertions.

These facts are somewhat analogous to the situation in Beck, where the police stated that some unidentified person had provided some unspecified information that led the officer to arrest the defendant. In Beck, the Supreme Court declared:

> It is possible that an informer did in fact relate information to the police officer in this case which constituted probable cause for the petitioner's arrest. But when the constitutional validity of that arrest was challenged, it was incumbent upon the prosecution to show with considerably more specificity than was shown in this case what the informer actually said, and why the officer thought the information was credible.

Beck at 97. Similarly, the government in this case was required to come forward with more concrete information to support its general assertions. Without more, the government had not established probable cause, and the district court correctly ruled that the police illegally arrested Afaneh.

B. Detention and Questioning of Afaneh

The government maintains that the officers acted reasonably and permissibly in detaining and questioning Afaneh during the execution of the search warrant. Since they were allowed to detain and question Afaneh, it should not matter that they took the detention too far and actually placed Afaneh under arrest.

The government relies heavily on this court's opinion in United States v. Fountain, 2 F.3d 656 (6th Cir.), cert. denied, 114

S.Ct. 608 (1993), in arguing that the police officers were allowed to detain and question Afaneh during the execution of the search warrant. The dissent distinguishes Fountain on two grounds. First, it concludes that Fountain addressed a situation where officers "discovered" four individuals during the execution of a search warrant, whereas the officers in the present case had made a prior determination to arrest every employee found at the store. Second, the dissent notes that the officers in the present case immediately placed Afaneh under arrest, while the detainee in Fountain was not arrested until after he made an incriminating statement. The dissent feels this second distinction is especially important because "there is a distinct possibility that Afaneh's responses to the officers' inquires may have differed had he understood that he was simply being detained during a search."

We do not agree that Fountain either can or should be distinguished on either of these grounds. Indeed, we do not think Fountain is distinguishable in any relevant respect from this case. In Fountain, ATF agents had a search warrant for a particular house. When they executed the warrant, they found four people at the residence. All four were moved into one room, where they were handcuffed, given Miranda warnings, and forced to lie face down on the floor during the search. The search revealed narcotics and firearms. After the search, the agents took one of the men, Carlton B. McEaddy, into an adjacent room and questioned him. McEaddy admitted that he was a convicted felon and that he had handled the guns. The agents then took McEaddy upstairs, where he was questioned again and arrested.

This court upheld the initial detention of McEaddy during the search pursuant to Michigan v. Summers, 452 U.S. 692 (1981). Summers held that a search warrant contains an implicit authorization permitting officers to detain occupants of a house during the execution of the warrant. During the search at issue in Summers, the officers discovered illegal narcotics. The Supreme Court held that this discovery provided probable cause to arrest the detainee, since he was the owner of the house.

Like the search in Summers, the search in Fountain revealed illegal narcotics. This court, however, concluded that the search of the house in Fountain provided only reasonable suspicion with respect to McEaddy, not probable cause. This difference is significant because, as McEaddy was not the owner of the house,

the officers could not presume that he knew about the drugs and the guns found during the search. Since the search did provide reasonable suspicion, though, the officers were permitted under Terry v. Ohio, 329 U.S.20 (1968), to briefly question McEaddy before releasing him. Under Terry, officers were allowed to briefly detain and question a suspect in order to confirm or dispel their suspicions about his involvement in unlawful activity, provided they possess reasonable suspicion concerning that involvement. McEaddy's answers to the officers' questions provided probable cause to arrest him, which, in turn, provided justification for the second interrogation upstairs and the arrest.

Here, the search warrant and the allegations in the affidavit supporting the warrant provided the necessary reasonable suspicion for questioning Afaneh. Afaneh was either the manager or owner of a store where undercover officers engaged in two separate illegal food stamp transactions. Thus, under Summers, Terry, and Fountain, the officers were allowed to detain Afaneh and briefly question him while they executed the search warrant.

This conclusion is further reinforced by a comparison of the house in Fountain and the store in the present case; both are inherently dangerous places. In Fountain, the officers were searching a drug-trafficking house, a place where guns are often found. Dave's Drive Thru Mini Mart is an inner-city convenience store and is located in a high-crime area where several homicides had recently occurred. Consequently, any reasonable officer would anticipate a significant danger of guns on the premises. In addition, the officer in charge of the search knew that Afaneh, the man running the store, was a convicted felon.

The search warrant explicitly authorized the police to search Dave's Drive Thru for weapons. It follows that, if the officers had the court's permission to search for weapons, they should also be allowed to ask a detainee about any guns that might be present in the store. A question is less intrusive than a search and provides important protections for the safety of the officers involved in executing the warrant. Hidden, loaded firearms pose obvious dangers, which can be avoided if the officers are able to locate and secure the guns at the outset of the search.

Thus, under existing law, the officers were justified in detaining Afaneh during the execution of the search warrant. They were also justified in handcuffing him during this detention. Unlike

our brother in dissent, we do not believe the words "you're under arrest" carry any talismanic significance such that they would cause Afaneh to respond differently than if he were simply informed that he was being detained, especially as Afaneh was given Miranda warnings and knew that he had the right to remain silent.

The statements made by Afaneh following his arrest did not follow simply because he had been "arrested" rather than "detained." The police could have asked the same questions and elicited the same statements even if they had not arrested Afaneh. No constitutional right of Afaneh's was violated. Suppressing Afaneh's statements would expand the exclusionary rule past the boundaries currently established by the Supreme Court and by this court. Accordingly, we reverse the district court's decision to suppress the statements.

IV. Refusal to Suppress Weapons

Afaneh contends that the officers found the guns only as a result of his statements. Because the statements followed an illegal arrest, the guns are the fruit of the poisonous tree and should be suppressed. Afaneh argues that the district court erred in using a "public safety" exception to allow the guns.

We decline to reach this because we have no jurisdiction to do so. 18 U.S.C. § 3731 grants only the government the right to an interlocutory appeal of a decision to suppress evidence. A defendant may appeal such a decision only after trial. See, e.g., United States v. Eccles, 850 F.2d 1375, 1361-62 (9th Cir. 1988); United States v. Andrews, 600 F.2d 563, 565 n.2 (6th Cir. 1979).

V.

For the foregoing reasons, we **REVERSE** the district court's decision to suppress Afaneh's statements. We decline to reach Afaneh's challenge to the district court's refusal to suppress the weapons.

BOYCE F. MARTIN, JR., Circuit Judge, concurring in part and dissenting in part. I concur in the majority's decision not to reach Afaneh's challenge to the district court's denial of his motion to suppress the weapons found during the search of the store in which he worked. In addition, I readily acknowledge the police

officers' limited authority under Michigan v. Summers, 452 U.S. 692, 705 (1981), to detain Afaneh, as an occupant of the premises, while conducting the search. I do not believe, however, that this authority extends to a right to interrogate Afaneh, especially as to the ownership of the firearms in question. Accordingly, I respectfully dissent from the majority's conclusion that the district court erred in suppressing the statements Afaneh made following his illegal arrest.

The majority reasons that the officers' conduct in this case is indistinguishable from that of the law enforcement agents in United States v. Fountain, 2 F.3d 656 (6th Cir.), cert. denied, 114 S.Ct. 608 (1993). Fountain, however, addressed an issue not relevant here: whether a non-resident of a house could be detained under Summers as an "occupant" of those premises. More importantly, Fountain involved the detention of four individuals whom the officers discovered while executing a valid search warrant. Here, by contrast, the officers decided prior to executing the warrant to arrest any employee found in Dave's Drive Thru, and immediately arrested Afaneh upon entering the store. As a convicted felon with some knowledge of the prosecutorial process, there is a distinct possibility that Afaneh's responses to the officers' inquiries may have differed had he understood that he was simply being detained during a search. Because this case does not involve merely the brief detention of an occupant during the execution of a search warrant, the officers' conduct in arresting Afaneh without a warrant and without probable cause is not justifiable under the rationale announced in Summers and applied by this Court in Fountain. Thus, the district court properly suppressed Afaneh's statements.

FILED
93 AUG-3 P.M. 4:24
Clerk, U.S. District Court
Northern District of Ohio
Akron

DOWD, J.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Case No: 1:93 CR 175
	)	
Plaintiff,	)	
	)	HON. J. DOWD
vs.	)	
	)	
MARWAN AFANEH,	)	**MEMORANDUM OPINION**
	)	**AND ORDER**
Defendant.	)	

I. INTRODUCTION

The defendant has filed two motions that require a pre-trial ruling. The defendant has filed a motion to suppress two weapons seized from Dave's Drive-Thru where the defendant is employed as a manager and which constitute the predicate for the indictment. The motion to suppress is also directed to statements allegedly made by the defendant on the date the business place was searched as a product of an unlawful arrest.

The defendant has also moved to dismiss the indictment.

In response to the motion to suppress, the court conducted an evidentiary hearing on July 23, 1993. The parties have filed supplemental briefs with respect to the motion to suppress and have also filed briefs in connection with the defendant's motion to

dismiss. Both motions are now at issue.

II. THE MOTION TO SUPPRESS

A. The Statements and Conduct of the Defendant at the time of his Warrantless Arrest on February 8, 1993.

A judge of the Cuyahoga Common Pleas Court issued a search warrant for the search of Dave's Drive-Thru at 11625 Superior in the city of Cleveland on February 8, 1993. The warrant was executed by Detective Alexander of the Cleveland Police Department. The was assisted by several other officers in a searching party of five. The defendant and two other employees of Dave's Drive-Thru were present when the searching party arrested. Each employee, including the defendant was arrested without the benefit of an arrest warrant and handcuffed. Tr. of July 23, 1993 hearing at pp. 74-75.[1] After the defendant was handcuffed, he was asked if there were any weapons on the premises and the defendant directed the searching party to the two weapons.[2]

The defendant was then taken to police headquarters, detained over night and then released. No complaint charging the defendant with a food stamp violation was filed, even though the arresting officers now contend that they had probable cause to arrest the defendant for a food stamp violation and assert probable cause as the basis for the defendant's warrantless arrest upon the entry into Dave's Drive-Thru to execute the search warrant.[3]

The affidavit in support of the search warrant as to Dave's Drive-Thru asserts as the probable cause for the issuance of the warrant the following:

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[1] There was also a black female on the premises, but she was not arrested. It is not clear whether she was an employee or a customer.

[2] Detective Alexander testified that the defendant indicated that there was a weapon in the office area and a second weapon in an air duct in a bag. The defendant was questioned about the ownership of the weapons which he denied, but allegedly stated that the weapons were left by the prior owners of the store. Tr. of the July 23, 1993 hearing at pp. 77-79

[3] Detective Alexander stated that Detective Brady conducted a briefing before the execution of the search warrants and indicated that Detective Brady instructed that all employees at the scene were to be arrested. Tr. of July 23, 1993 hearing at 72.

11625 SUPERIOR, DAVE'S DRIVE THRU MINI-MART & KITCHEN, a store licensed to accept FEDERAL FOOD STAMP COUPONS, on Tuesday, February 2, 1993, an undercover law enforcement officer ordered one (1) fifth of Wild Irish Rose Wine; placed a fifty dollar book of FEDERAL FOOD STAMPS on a turntable and asked "how much cash can I get for the rest of it". The cashier said "36". The officer said "okay" and the cashier gave the officer $36.00 in U.S. Currency and the bottle of wine. On the same day a second undercover law enforcement officer ordered a 40 oz. bottle of Old English 800 beer which totaled $1.90. The cashier brought the beer to the counter and the officer gave the cashier one (1) five dollar FEDERAL FOOD STAMP and received three (3) one dollar FEDERAL FOOD STAMPS and ten cents in coin as change.

EXHIBIT A-14.

Detective Brady of the Cleveland Department was the affiant for the search warrant and was in charge of the searching parties. He directed that all persons on the premises of the twenty five business places be arrested, handcuffed and driven to the Cleveland Police station even though no arrest warrants had been issued. Detective Alexander of the Cleveland Police Department was in charge of the five person searching party at Dave's Drive-Thru. He confronted the defendant as he entered the Drive-Thru and informed the defendant that he was under arrest for food stamp trafficking violations. Tr. of July 23, 1993 hearing at 67. Detective Brady, the affiant for the search warrant, issued a request to the searching parties prior to the search of Dave's Drive-Thru that all employees of the stores to be searched be arrested. Tr. of July 23, 1993 hearing at 20. Brady testified that "everyone was arrested in the store because it was our understanding everyone working at the store was involved in the trafficking of the food stamps." Tr. of July 23, 1993 hearing at 42. However, Brady failed to articulate a basis for that understanding. No additional reason was advanced for the defendant's arrest nor does the affidavit for the search warrant indicate the identity of the persons engaged in food stamp

violations.

The prosecution relies on the testimony of Detective Brady for the proposition that Detective Alexander made a lawful arrest of the defendant for food stamp violations before he was handcuffed and asked about weapons. The court finds that both Detective Brady and Detective Alexander failed to articulate the requisite probable cause to justify a lawful warrantless arrest of the defendant.

Beck v. Ohio, 379 U.S. 89, 91 (1964) teaches that whether a warrantless arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, "the officers had probable cause to make it -- whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." Neither Brady or Alexander had any knowledge that the defendant had engaged in food stamp violations and neither had been provided with any information that would provide a reasonable basis for believing that the defendant had committed or was committing a food stamp violation. The testimony that at least three employees were on the premises of Dave's Drive Thru at the time the search warrant was executed is sufficient to demonstrate that Dave's Drive Thru is operated by multiple employees at the same time. The report of two food stamp violations on the premises at an earlier time, as set forth in the affidavit for the search warrant, neither justifies or supports a lawful warrantless arrest of any employee subsequently discovered to be on the premises. Moreover, Detective Brady and Detective Alexander's testimony is belied by their subsequent failure to file a complaint, based upon the warrantless arrest of the defendant for a food stamp violation, as mandated by Rule 4(E) (2) of the Ohio Rules for Criminal Procedure.[4]

The court now turns to the consequences of the unlawful arrest. It is firmly established that evidence seized in violation of a

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[4] The Ohio Rules of Criminal Procedure at Rule 4 (E)(2) provides:

(2) Arrest without warrant. Where a person is arrested without a warrant the arresting officer shall, except as provided in division (F), bring the arrested person without unnecessary delay before a court having jurisdiction of the offense, and shall file or cause to be filed a complaint describing the offense for which the person was arrested. Thereafter the court shall proceed in accordance with Crim. R. 5. (Emphasis added).

defendant's Fourth Amendment protections is inadmissible. For instance, see Davis v. Mississippi, 394 U.S. 721 (1969); Brown v. Illinois, 422 U.S. 590 (1975); Dunaway v. New York, 442 U.S. 200 (1979); Taylor v. Alabama, 457 U.S. 687 (1982), and Hayes v. Florida, 470 U.S. 811 (1985).

As the defendant's warrantless arrest was unlawful, his conduct indicating the location of the two weapons is suppressed. There is absolutely no showing of any acts that could be said to attenuate the taint of the unlawful arrest so as to remove the taint, thereby rendering the subsequent conduct of the defendant in indicating the locations of the weapons admissible.

B. The Suppression of the Two Handguns Seized on February 8, 1993.

The suppression of the defendant's statements and conduct in which he discussed the two weapons and directed the searching party to their location leaves the remaining issue of whether the discovery of the weapons should also be suppressed.

Anticipating the possibility that the court would determine the arrest to be unlawful, the government asserts that the searching officers were entitled to make a protective sweep for weapons as a prelude to the search or, alternatively, that the doctrine of "inevitable discovery" negates a suppression of the discovery of the weapons. Count one of the indictment charges the defendant with the possession of a Rohm, RG-38, revolver and count two of the indictment charges the defendant with the possession of an EIG, Special Police .38 caliber revolver. The Rohm revolver was located under the counter in the vicinity of the cash register by the front door and the EIG revolver was located in an air duct.

Nix v. Williams, 467 U.S. 431 (1984) declined to impose the sanction of suppression in those situations where the prosecution is able to establish by a preponderance of the evidence that the information or the items seized ultimately or inevitably would have been discovered by lawful means. The government maintains that both weapons would have been discovered by the execution of a search warrant. The search warrant itself directed the officers to seize "weapons and contraband" even though the affidavit failed to support such a general search or seizure. Thus, as the government's argument continues, the officers would have

discovered the two weapons in compliance with the search warrant and seized them. In that context, the government argues that the good faith exception set forth in United States v. Leon, 468 U.S. 897 (1984) would foreclose suppression even where there was no basis for that part of the warrant which ordered the search and seizure of "weapons."

The court agrees with the government's contention that the weapon described in count one and located near the cash register would have "inevitably been discovered." However, the testimony presented by the government is insufficient to demonstrate that the EIG revolver, located in the air duct, would have inevitably been discovered absent the defendant's directions.[5]

Following the warrantless arrest of the defendant by Detective Alexander, Special Agent Roy Cavan of the Federal Bureau of Investigation inquired of the defendant whether there were any firearms present in the store. Cavan indicated that the

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[5]The court conducted a detention hearing on June 9, 1993. During that hearing, Special Agent Cavan of the FBI, who was also present during the search, described the discovery of the EIG revolver as follows:

> A. He indicated that yes there was another weapon in his office.
>
> Q. Did you make attempt to secure that weapon?
>
> A. I did. Mr. Afaneh in company with myself and Detective Alexander walked through the drive-through section to an office area which had a minimal amount of storage, a desk, a safe, and other what looked like store records.
>
> And he indicated that there was a weapon to the right of his desk, slightly behind the desk in the area of an air duct.
>
> Q. And did you secure that weapon?
>
> A. Yes, I did. I located the weapon. It was in a paper bag. And again another 6-shot blue steel revolver loaded with six rounds.
>
> Q. And can you tell us exactly the location of this particular weapon.
>
> A. Well, there was an air duct or heating duct immediately to the right of his desk along the wall. And it was slightly under that. So, it was partially hidden from view. If you didn't know it was there, I don't think you would have noticed it. (Emphasis added).

Tr. of pretrial detention hearing of June 9, 1993 at pp. 13-15.

request for information about firearms was for the purpose of the "safety of the personnel on the scene." Tr. of June 9, 1993 Detention Hearing at 13. The defendant then directed the searching party to the two weapons that constitute the basis of counts one and two of the indictment. As the court has previously indicated, the affidavit for the search warrant contained no information that would have justified a general search for firearms. Consequently, if one were to assume that there was no directive in the search warrant to search for firearms, there still remains the question of whether, at the commencement of a search, it is so improper for enforcement officers to inquire about the possibility of firearms before the search begins so that any subsequent discovery of firearms must be suppressed as an appropriate sanction. This court declines to so rule. It is well known that loaded firearms constitute hazards. When a searching party, responding to a lawfully issued search warrant, is engaged in a meticulous search of a property such as authorized in this case, there is always the possibility of an inadvertent discovery of a firearm under circumstances that might be hazardous to the searching party. Consequently, with or without a mandate to seize weapons contained in the search warrant, the court is of the view that it is not unreasonable to inquire about the possibility of firearms on the premises, taking into account the safety of all persons on the premises, be they a part of the searching party or mere bystanders. Consequently, the court will not impose the sanction of suppression as it relates to the recovery of the two weapons. Having so concluded, it is unnecessary to address the question of whether the Leon good faith exception should be super imposed upon the "inevitable discovery" of the weapon near the cash register.

Consequently, the defendant's motion to suppress the weapons as described in counts one and two is denied.

C. Conclusion.

The defendant's motion to suppress his statements and testimony as to his conduct on February 8, 1993 in pointing out the location of the two weapons described in counts one and two of the indictment is sustained. The government is foreclosed from introducing any testimony as to how or by what means the weapons were recovered to the extent that the testimony would make any reference, direct or indirect, to the statements or conduct of the defendant.

The defendant's motion to suppress the weapons is denied.

III. THE MOTION TO DISMISS.

The defendant has moved for the dismissal of the indictment charging him with being a felon in possession of a weapon based upon the following "stipulated"[6] facts.

1. The Defendant, a Felon, Was Lawfully Employed As A Manager Of A "Drive Thru Mini-Mart";

2. The "Drive Thru Mini-Mart" Is Open 24 Hours Per Day In A High Crime Area;

3. Other Employees Work At The Store In The Sale And Stocking Of Inventory And In The Capacity Of Cashiers, And Fear For Their Safety, As Robberies, Shootings And Murders Are Common In The Immediate Area, Especially With Store Owners And Operators Of Arab/American Descent;

4. Two (2) .328 Caliber Loaded Revolvers Were Kept In A Common Area Of The Store, Under The Cash Register, And Next To The Safe In A Storage/Office Area, For Obvious Security Reasons, With The Full Knowledge Of The Store Employees, Including The Defendant -- A Store Manager;

5. The Defendant Does Not Own The Store Or The Two (2) .38 Caliber Revolvers;

6. There Is No Evidence That The Defendant Ever Physically Possessed Either Of The Two (2) .38 Caliber Revolvers; And,

7. The Defendant Fully Believed It Was Permissible For Two (2) .38 Caliber Revolvers To Be Preset At The Store For Security Reasons.

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[6]The concept of stipulation means that both parties agree. However, the court finds no evidence to support the claim of stipulation.

The government has opposed the motion. The government points out that motions to dismiss indictments are limited by Rule 12(b)(1) & (2). Clearly, Rule 12(b)(1) & (2) does not apply to this motion. Moreover, to the extent, duress and necessity are advanced as reasons for the defendant's conduct, such an affirmative defense is a matter for presentation at the time of trial. The motion to dismiss is without merit and is denied.

IT IS SO ORDERED.

David D. Dowd, Jr.
U.S. District Judge

FILED

AUG 18 1994

LEONARD GREEN, Clerk

No. 93-3900

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	ORDER
MARWAN AFANEH,	)	
	)	
Defendant-Appellee.	)	

BEFORE: MARTIN, RYAN, and SUHRHEINRICH, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

RECEIVED
Aug 23 1994
LEONARD GREEN, CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	:	CASE NO. 93-3900
	:	
Plaintiff-Appellant	:	
	:	**FILED**
vs.	:	AUG 23 1994
	:	**LEONARD GREEN, Clerk**
MARWAN AFANEH,	:	
	:	
Defendant-Appellee.	:	

MOTION FOR STAY OF MANDATE PENDING APPLICATION TO THE SUPREME COURT FOR A WRIT OF CERTIORARI

Now comes the Defendant-Appellee, **MARWAN AFANEH**, by and through his undersigned counsel, and respectfully moves this Honorable Court, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, to enter an Order granting a stay of the mandate in the herein Appeal pending the application by Defendant-Appellee to the Supreme Court for a Writ of Certiorari.

Respectfully submitted,

YELSKY & LONARDO CO., L.P.A.
BY: LEONARD W. YELSKY, ESQ.
Ohio Reg. No. 0034277
BY: ANGELO F. LONARDO, ESQ.
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Counsel for Defendant
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MOTION GRANTED
FILED 8-26-94
BY THE CLERK PURSUANT TO
RULE 8(B) SIXTH CIR. RULES
LEONARD GREEN, Clerk
COPIES MAILED 8-26-94

Stay of Mandate granted
until 10-25-94